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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION TWO

In re the Marriage of SHERY CHARCHIAN and KOUROSH MAHGEREFTEH, SHERY SHAHRZAD CHARCHIAN, Appellant, v. KOUROSH MAHGEREFTEH, Respondent.	B270201, B276852 (Los Angeles County Super. Ct. No. BD500494)

APPEAL from a judgment of the Superior Court of Los Angeles County. Mark Juhas, Thomas Trent Lewis, Kathleen Diesman, Judges. Affirmed.

Axel Law and Keri Curtis Axel for Appellant.

Law Offices of Avery M. Cooper and Avery M. Cooper for Respondent.

Law Offices Daniel Ritkes and Daniel Ritkes for Joseph Mahgerefteh as Amicus Curiae on behalf of Respondent.

Appellant Shery Shahrzad Charchian (wife) appeals from a judgment entered after a 10-day trial in this marital dissolution case in which the trial court determined that many real properties were the separate property of her former husband Kouroush Mahgerefteh (husband). Wife asserts that the trial court erred in: (1) failing to grant her pendente lite attorney fees, (2) denying any community interest in the real properties at issue, (3) refusing to grant her a continuance of trial, (4) finding that certain Bank of America (BofA) bank accounts in wife's name were community property, (5) refusing to order retroactive modification of the support order, and (6) refusing to grant wife's request for attorney fees for appeal.

We find no reversible error, therefore affirm the judgment.

BACKGROUND

Petition for dissolution

On February 13, 2009, husband filed a petition for dissolution of marriage, alleging that the parties were married on March 7, 1999, and separated on January 31, 2009, for a marriage of nine years ten months. The parties had one minor child born in 2003.

Husband's business and the parties' finances during marriage

Husband owned eight properties prior to his marriage to wife. Three of these were owned by husband alone, and five were

co-owned with husband's brother, Joseph Mahgerefteh (brother).[1] Husband described his professional relationship with brother as "partners." However, he described brother as the partner who "does a little bit more." Each month, husband received a "draw" of $4,500, and brother received a monthly stipend of $5,500 per month.[2] Husband and brother had a loose agreement regarding funds kept in the partnership's bank accounts. They supervised an employee who performed clerical duties such as writing checks, talking to tenants, and hiring outside services such as plumbers and electricians.

Wife testified that husband was making money in other ways during the marriage, including "remodeling for third parties," "doing business online," and "doing stocks . . . buying and selling online." Wife suggested that husband was paid in cash for some of these activities, as he often purchased things in cash.

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[1] Wife joined brother as a claimant for trial under Family Code section 2021, which permits joinder of a person who claims an interest in the proceeding on September 16, 2013. However, brother is not a party to this appeal, as wife has not appealed the trial court's later dismissal of brother as a joined party. Brother nevertheless filed a respondent's brief, which we have read and considered as an amicus brief.

[2] In a 1999 loan application, husband purported to have a monthly income of $47,264. In a 2004 loan application, husband purported to have annual income of $287,706 and net assets of $7,582,838. He claimed the $47,264 monthly income figure was inaccurate but admitted he signed the application. He stated that he signed the document as a blank document that the loan officer later completed.

During the marriage, husband sold his 50 percent share of a property, referred to as the Corning property, to brother. Husband testified that he owed brother "a bunch of money" from prior transactions. Husband had previously borrowed money from brother to buy properties in husband's name. An investor wanted to buy the Corning property at a high price, so husband sold his share of the property to brother for a low price as a way of paying back the money that husband had previously borrowed from brother. Brother subsequently sold the property for over a million dollars, and acquired another property on Ardmore with the proceeds.

Three properties were remodeled during the marriage. Husband described these properties as "Highland Gorge, Lankershim, and 12th Street." The Lankershim property was damaged in a fire. Husband testified that he and brother used insurance as well as their own funds for the remodel. The 12th Street property was damaged by an earthquake, and was renovated with new framing, plumbing, electrical, roofing, and windows. These renovations were paid for from the business account owned by husband and brother.

Brother purchased a property on Mentone Avenue during the marriage, which he testified he purchased with his own money, although the money came from a joint account with husband. When asked how he knew it was from his own share of the money, brother responded, "we have a loose agreement and we know." Brother prepared a quitclaim deed to give a 65 percent interest in the Mentone property to husband, but never filed the document. When asked why he prepared the quitclaim, he indicated that he did not have a will, and if something happened to him, he wanted to leave something to his parents.

Brother did not explain why the quitclaim named husband, instead of his parents.

Brother also purchased a property on Fairfax Avenue during the marriage. Husband denied any ownership interest in the Fairfax property, although he was listed as the original buyer in the escrow documents. Husband did admit that he wrote a check for $35,000 on behalf of brother to purchase the Fairfax property. Husband testified that he frequently wrote checks on behalf of brother. He stated that the money was from a joint account with brother, and that the two of them had multiple joint accounts. Husband acknowledged giving wife a photo of the Fairfax property with a note that read, "To my dearest Shery Berry. With love, Kourosh." Wife testified that husband gave her the photo and note on Valentine's Day, saying he bought the property for her. However, husband continued to deny an ownership interest in the Fairfax property and could not recall why he gave her that photograph.

During the marriage, husband and brother purchased four vacant lots. The money to purchase the lots came from the brothers' business accounts. The title to the property was held as "Joseph and Kourosh Mahgerefteh, husband and wife as joint tenants." Husband did nothing to correct the title. The court made it clear that the four lots were presumptively community property since they were purchased during marriage, and that it was husband's burden to show that they were purchased with separate property to make them husband's separate property. Husband testified the lots were paid for with "separate money from [the] business."

Michael Krycler, a forensic accountant testified as an expert witness. For the year 2014, he calculated gross income of

$12,000 per month on which to base support.[3] He calculated the parties' marital standard of living based on a draw of $4,500 per month from the business and an apartment that was provided to the family. His opinion was supported by tax returns and conversations with husband. Because the tax returns showed little income early in the marriage, Krycler opined that money used to pay for improvements in the properties must have come from separate property.

The court found that there was no evidence that husband's property, which was purchased either before marriage or with his separate property, was community in character. Nor was there any evidence that community property funded husband's separate property.

Child and spousal support

In August 2010, at the first pretrial hearing and at wife's request, the court ordered temporary child and spousal support based on husband's claim of a $4,500 monthly salary. The only evidence available was husband's income and expense report (I&E). The court indicated it was "very suspicious" of husband's claims regarding his finances, but that was different from having actual evidence. The court stated to wife, "[p]rove to me that he's been deceitful, if he has, in his I&E and then you may see a very different order."

The court continued mother's request for retroactive support to the time of trial.

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[3] The court asked husband's and wife's accountants to confer, but wife's accountant, Brian Lewis, calculated monthly cash flow of $14,400 for the same time period.

Pretrial litigation and wife's requests for pendente lite fees

Wife's first attorney fee request

Wife filed her first request for attorney fees in February 2010. At the time, she was represented by Attorney Ronald A. Litz. Wife sought attorney fees, appraisal fees, and forensic accounting fees pursuant to Family Code sections 2030 and 2032.[4] She petitioned the court for fees because she was the primary caretaker for the parties' child and husband controlled all of the finances. As such she was at a severe disadvantage in determining the value of the community estate. Husband opposed the request. He argued that wife did not merit an award because she controlled two bank accounts: (1) a joint account at Union Bank of California (Union Bank) with a $55,000 balance; and (2) a BofA account with a balance of $250,000. Husband further declared that wife admitted to paying her attorney $36,000 from community funds.

The hearing on wife's first request was held on August 4, 2010, before Judge Lewis. The court indicated that it did not see "the actual need for attorney fees since [wife] apparently availed herself of approximately $36,000 worth of funds, whether they were separate or community is debatable." The court indicated that had it been asked to case manage attorney fees, it may have reached a different order, but no such request was made. The court further found wife's *Keech* declaration inadequate to

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[4] All further statutory references are to the Family Code unless otherwise noted.

support the fees requested.[5] The court ordered husband to pay $1,500 without prejudice to wife seeking fees with a satisfactory *Keech* declaration in addition to a properly noticed request under section 2032. The court also ordered approximately $12,000 in joint income tax refunds to be divided equally between the parties' lawyers.

Wife's second attorney fee request

Wife next requested fees in March 2011. She was then represented by Attorney Barry Fischer, who substituted in on November 19, 2010. Wife requested that the court manage attorney fees pursuant to section 2034, subdivision (c), and requested fees for forensic accounting and appraisals. The matter was set for hearing on April 11, 2011.

On April 11, 2011, the court indicated that it wanted an evidentiary hearing, so the matter was continued to May 4, 2011. Wife brought her forensic accountant, Brian Lewis, to court, but because he was not on the witness list, the court did not allow

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[5] The court's reference to a *Keech* declaration refers to *In re Marriage of Keech* (1999) 75 Cal.App.4th 860 (*Keech*). In *Keech,* a fee award was reversed where such fees were awarded without proper inquiry into whether such fees were reasonably necessary. To conduct a proper inquiry, the court must consider "'"the nature of the litigation, its difficulty, the amount involved, the skill required and the skill employed in handling the litigation, the attention given, the success of the attorney's efforts, his learning, his age, and his experience in the particular type of work demanded [citation]; the intricacies and importance of the litigation, the labor and the necessity for skilled legal training and ability in trying the cause, and the time consumed." [Citations.]' [Citation.]" (*Id.* at p. 870.) Without evidence of these factors, a trial court cannot determine the reasonableness of fees requested.

him to testify. In addition, wife wanted to use a deposition transcript from a deposition that had been taken the day before the hearing. The court did not permit the use of the unsigned deposition transcript. The court offered wife the choice of proceeding or withdrawing the application and refiling it at a later date. Wife's counsel, who wanted to use the deposition transcript, then withdrew the application with the intent to refile.

In March 2012, wife requested that Attorney Fischer sign a substitution of attorney. Attorney Fischer filed a motion for fees pursuant to *In re Marriage of Borson* (1974) 37 Cal.App.3d 632 (*Borson*), indicating he would sign the substitution after the filing of his motion. The court granted the motion, but reserved the issue of the amount of such fees to a later proceeding.[6]

Wife's third attorney fee request

Attorney Bruce Mandel substituted in as counsel for wife in May 2012. In June 2014, over three years after her March 2011 request, wife filed another request for order seeking attorney fees and expert fees. Wife asserted that she had no income other than the child and spousal support the court had previously ordered in the combined amount of $1,896 per month, and had no significant separate property until the community property issues were resolved. Wife further asserted that she needed money for discovery, as motions to compel and depositions were necessary. She requested $100,000 for attorney fees, $25,000 towards legal costs and $60,000 for her forensic accountant.

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[6] In *Borson*, the Court of Appeal held that notwithstanding a wife's discharge of her attorneys, the attorneys had authority to file a motion on her behalf seeking fees from wife's former husband. (*Borson, supra*, 37 Cal.App.3d at p. 637.)

The matter was set for hearing on August 19, 2014. The court noted at the hearing that "there has been plenty of time to get this case ready." The court opined that "this case has languished long enough," and indicated it would continue all remaining requests for orders (RFO), including wife's request for fees, until the time of trial. Wife's counsel stated, "my client is far in debt with respect to legal fees, expert fees. And, in order to prepare this the rest of the way for trial, she needs some money, and there was misrepresentations made by petitioner regarding his income four years ago that only came to light in May of this year." The court clarified that wife was seeking fees, not support, then indicated its intention to deny the request without prejudice to wife raising it at the time of trial. The court set a final status conference date of October 24, 2014, and continued wife's request for fees until trial. The court indicated that all pending RFOs were continued without prejudice to wife seeking fees at the time of trial, and stated, "[t]his will incentivize the parties to get this case finished, which is what it needs to be -- is finished."

At the trial setting hearing on October 24, 2014, wife again requested a continuance because lack of money had "hamstrung [her] . . . with respect to experts and . . . costs." Wife's request was denied. The court observed, "Then she has lots of incentive to settle the case because you are going to get a trial date today." The court ordered the parties to the daily settlement officer, stating that if the case was not settled "I'm deeming that this case could have been ready for trial. And, if [wife] is not ready, then [wife] will just have to bear the consequences of not being ready. I'm sorry, but I've given you . . . ample time to get this case ready." The parties returned to the courtroom without a

settlement, and Attorney Mandel informed the court that wife had fired him.

The matter was set for trial on February 17, 2015, and reassigned to Judge Juhas.

Wife's fourth attorney fee request

After the trial was set for February 2015, wife obtained a continuance over the objection of husband to April 15, 2015. On November 5, 2014, the law firm of Fernandez & Karney appeared for wife, but moved to withdraw in January 2015. Wife opposed the withdrawal, stating that she had given the firm a $20,000 retainer, and they had agreed to receive the balance "from settlement proceeds." However, she was not inclined to settle so they wanted to be relieved. On March 23, 2015, the trial court granted the withdrawal motion.

On April 2, 2015, two weeks before the trial date, wife filed an ex parte application in pro. per. seeking a trial continuance, discovery extension, and an award of attorney fees and costs. At the April 2, 2015 hearing, the court continued trial to the week of July 6, 2015. The court refused to reopen discovery, stating, "Discovery is what it is. It's been around a very long time." Wife's fee request was set for hearing on April 27, 2015.

On April 22, 2015, Attorney Michael Gulden filed a counsel substitution and declaration requesting $50,000 to prepare for trial.

At the April 27, 2015 hearing, Attorney Gulden appeared on behalf of wife. The issues set forth in wife's ex parte application were submitted after the hearing. On April 28, 2015, the court provided a ruling on submitted matters. The request for a trial continuance was denied. The court also denied wife's request for expert fees, as there was "insufficient information as

to the need for an expert and what they [*sic*] will do." As to wife's attorney fee request, the court noted that "[wife] has a need given the current financial disparity between the parties." However, wife's attorney "did not provide sufficient information pursuant to [*Keech*] for the court to adequately rule on the fee request." The court required further information, and concluded, "Based on the filings in this matter, there is insufficient information for the court to make an award; the fee request is denied."

Wife's fifth attorney fee request

On May 20, 2015, wife filed another request for fees. On June 24, 2015, the court ordered husband to pay $50,000 to wife's attorney by the first trial day. The court found a "vastly different ability to pay," but did not award more because wife did not provide details of previously-incurred fees.

On July 2, 2015, four days before the trial date, wife filed an ex parte request for reconsideration of the June 24, 2015 order and to continue trial. She attached numerous pages of her former attorney's bills without redaction. On July 2, 2015, the court denied wife's request for ex parte relief.

Trial and judgment

The case went to trial on July 6, 2015. Trial lasted 10 days. The court filed its final ruling after trial on October 7, 2015. The court awarded wife $1,512 per month in child support and $1,750 per month in spousal support until December 31, 2016. The spousal support payments would gradually lessen until December 31, 2017, at which time the payments would cease unless wife was able to demonstrate need. The court denied wife's request that the support be ordered retroactive to an earlier date, noting that there was no RFO pending. The court stated, "there is no legal authority for the court to retroactively adjust either the

spousal or child support payable to [wife] as there is no pending RFO."

The court confirmed as husband's sole and separate property all of the real estate discussed during the course of the trial. The court reasoned, "There is simply no evidence to support that this property, which was either purchased before marriage, or purchased with [husband's] separate property is community in character." The court also noted that it found husband more credible in this area of testimony. While there was evidence that husband used his separate property to pay community expenses, there was "absolutely no evidence that any community property funded in any way [husband's] separate property." Husband borrowed against the properties during the marriage, and in light of the evidence, "the sole place the lender could expect repayment was from the [husband's] sole property."

Wife was charged with repaying the community $250,194, which she took control of after separation. There was no evidence that this money was a gift from wife's parents, as wife claimed.

Judgment was entered on December 22, 2015.

Wife's request for fees on appeal

Wife filed her notice of appeal on February 10, 2016. On February 16, 2016, wife brought an ex parte motion seeking attorney fees for appeal. Wife attached declarations from attorneys Gregory R. Ellis (Ellis) and Greg May (May). Ellis set forth his career history and billable rate. "Because I know very little about the case at this point, I cannot knowledgeably estimate the total fees to handle the appeal." May similarly testified to his billing rate, and indicated that he had "not reviewed any significant documentation in this case."

A hearing on wife's motion was held on March 22, 2016, before Judge Diesman. Wife was self-represented at the hearing. She admitted that the attorneys she had been in contact with were unfamiliar with the case, and could only provide declarations as to their hourly rates and estimates of how much an appeal would cost. The court denied the request, stating, "Attorney fees are not awarded for purposes of a fishing expedition." The court noted its obligation in determining whether attorney fees should be awarded on appeal to "look[] to whether the appeal is in good faith and whether there are reasonable grounds for an appeal." Wife had "not stated in her declaration nor articulated any basis for her appeal." Further, the attorneys had not adequately explained whether the fees requested were reasonable for this type of case. Due to these shortcomings, the court did not reach the issues of need or ability to pay.

Wife filed another request for attorney fees on appeal on April 5, 2016. She attached a supplemental declaration from attorney Ellis, wherein he stated that he had been informed by wife that the court needed assurance that meritorious appellate issues existed. Ellis added, "I cannot provide that assurance at this point, because I was not involved in the trial of this matter and have not reviewed the reporter's or clerk's transcripts on appeal which, I am informed, do not even exist yet." He noted that wife had identified some potential issues, including the burden of proof regarding the character of property acquired during marriage and the denial of her requests for funds. However, Ellis could not "weigh in on the merits of those issues."

Wife's request was heard before Judge Diesman on June 8, 2016. The court did not find a change of circumstances since the

court had ruled on the motion a couple of months earlier. The court had reviewed the declarations and the case file. The court noted that "based upon the nature of this litigation, the manner which it's been conducted and this somewhat boilerplate declaration that I have, the court is not convinced that this appeal is brought in good faith." Therefore, the court denied wife's request for fees. The court also denied wife's request for costs of appeal, including transcripts, noting that there was evidence of money owed by wife to husband.

DISCUSSION

I. Denial of pendente lite attorney fees

In a proceeding for dissolution of marriage, the court has an obligation to "ensure that each party has access to legal representation" to preserve his or her rights. The court may, "if necessary based on the income and needs assessments," order one party to pay the other party's attorney fees during the pendency of the proceeding. (§ 2030, subd. (a)(1).) Wife contends that the trial court erred in denying her multiple requests for such pendente lite attorney fees throughout the litigation below.

A. Standard of review

The denial of attorney fees under section 2030 is reviewed for abuse of discretion. (*In re Marriage of Hatch* (1985) 169 Cal.App.3d 1213, 1218-1219 (*Hatch*).) "[W]hile the court has considerable latitude in fashioning or denying a pendente lite fee award its decision must reflect an exercise of discretion and a consideration of appropriate factors. [Citations.]" (*Id.* at p. 1219.) Such factors include relative need and ability to pay, as well as """"the nature of the litigation, its difficulty, the amount involved, the skill required and the skill employed in handling the litigation, the attention given, the success of the attorney's

efforts, his learning, his age, and his experience in the particular type of work demanded [citation]; the intricacies and importance of the litigation, the labor and the necessity for skilled legal training and ability in trying the cause, and the time consumed. [Citations.]"" [Citations.]" (*In re Marriage of Huntington* (1992) 10 Cal.App.4th 1513, 1523). A trial court order granting or denying attorney fees will not be overturned unless, ""considering all the evidence viewed most favorably in support of its order, no judge could reasonably make the order made. [Citations.]" [Citations.]" (*Ibid.*)

To the extent that our analysis requires the interpretation of provisions of the Family Code, such review is de novo. (*Chalmers v. Hirschkop* (2013) 213 Cal.App.4th 289, 300.)

B. Wife has failed to show error

Wife presents this issue in sweeping arguments that do not take into account the specific circumstances of each fee request and each hearing. We analyze each of her arguments as presented, and find that she has failed to demonstrate error.

Wife's first argument is that "[n]ever in the four pre-trial hearings before Judge Lewis did the [court] consider and make findings regarding relative need and ability to pay." In support of this argument, wife quotes section 2032, which provides that the court "shall take into consideration the need for the award to enable each party . . . to have sufficient financial resources to adequately present . . . the party's case adequately, taking into consideration . . . the circumstances of the respective parties." (§ 2032, subd. (b).) Wife asserts that the trial court's failure to make findings regarding relative need and ability to pay constitute an abuse of its discretion.

However, the overarching, discretionary language of the statute provides that a court "*may* make an award of attorney's fees and costs . . . where the making of the award, and the amount of the award, are just and reasonable under the relative circumstances of the respective parties." (§ 2032, subd. (a), italics added.) The mandatory language that wife cites is found in the following complete sentence: "In determining what is just and reasonable under the relative circumstances, the court shall take into consideration the need for the award to enable each party, to the extent practical, to have sufficient financial resources to present the party's case adequately, taking into consideration, to the extent relevant, the circumstances of the respective parties described in Section 4320." (§ 2032, subd. (b).)[7]

1. August 4, 2010 hearing

The trial court's first denial of fees was based on several rational factors, including wife's need. Specifically, the court did not find a need for attorney fees "since [wife] apparently availed herself of approximately $36,000 worth of funds." However, the court ordered husband to pay $1500 to wife's attorney. The court also found wife's *Keech* declaration insufficient, and denied the request without prejudice to wife seeking fees again with a revised *Keech* declaration and a properly noticed request under section 2032, subdivision (b). Wife does not provide persuasive argument that the trial court's order was unreasonable under the circumstances.

Wife misstates the trial court's rationale, claiming that the trial court denied her fee request because (1) she did not request

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[7] Section 4320 lists factors that a court must consider in awarding spousal support.

case management under section 2032, subdivision (d); and (2) the court found her attorney's declaration insufficient.

As to her first point, wife argues that the court misinterpreted its statutory obligation, which requires that it make findings, and if it finds relative need, make an order. Wife argues that a court cannot avoid this obligation because it prefers section 2032, subdivision (d)'s case management authority. Wife neglects to mention that the court noted that wife availed herself of $36,000 in funds, ordered husband to pay her counsel $1,500, and made its order without prejudice to a more complete *Keech* declaration. In noting that wife had taken a substantial sum of money, the court made an explicit finding that wife had no present need for fees -- however, it allowed for the possibility that she may need such fees in the future. The court's note that there had not been a request to case manage attorney fees pursuant to section 2032, subdivision (d), does not reveal an abuse of discretion.

As to her second point, wife argues that the *Keech* declaration is relevant to the issue of the amount of fees to award -- not whether or not to award fees. Wife argues that the court erred in disagreeing with the amount of fees requested, but failed to actually exercise its discretion. (Citing *In re Marriage of Cheriton* (2001) 92 Cal.App.4th 269, 318 ["In ruling on a need-based request for fees, a trial court is required to actually exercise its discretion"].) Again, wife fails to recognize that the court expressed that it did not "see the actual need for attorney fees" given wife's admitted removal of money from a bank account. This finding was reasonable and wife makes no argument that it was not supported by the evidence.

2. May 4, 2011 hearing

Wife next contends that she filed a request to case manage fees, complying with the court's "instructions." Wife mischaracterizes the trial court's ruling on that request, which took place at the May 4, 2011 hearing, continued from April 11, 2011. The trial court was prepared to proceed with a full hearing on the merits of wife's request for fees. Ultimately, however, wife's request was dismissed on that date at the request of wife, who "prefer[red] not to proceed on the record" that was before the court due to the fact that she could not call her forensic accountant or use an unsigned deposition transcript.

Wife quotes the trial court as stating that the court held that its prior ruling was "law of the case" and that "changed circumstances" would be required to overturn it. The testimony wife cites was the trial court's response to husband's argument that wife had presented nothing more than "an identical order to show cause that this court has already ruled on." The trial court declined to dismiss with prejudice wife's order to show cause, but clarified that wife would have to "show a change of circumstances" from her first request. Contrary to wife's representations in her brief, the quoted words did not provide "justification" for a denial of wife's request for fees.

Wife chose not to proceed with her request for fees that day. She cannot complain that the trial court abused its discretion in permitting her to withdraw her application on that date.

3. August 19, 2014 and October 24, 2014 hearings

Finally, wife argues that the court's last denial of her pendente lite fee request was an abuse of discretion because the

court denied the request in order to incentivize her to settle. Wife leaves out the critical fact that she had waited over three years to file this request, and at the two hearings at issue, the court was preparing to send the parties to trial. We analyze the events at the two hearings separately below, and conclude that no abuse of discretion occurred.

First, we note that the dissolution had been filed in February 2009. Thus, the matter had been pending for more than five years. On August 19, 2014, the court spent the majority of the hearing discussing a motion for a protective order filed on behalf of husband's parents. The court showed its impatience, stating, "Why did you wait so long to take their deposition?" Ultimately the court ordered that the deposition proceed by written questions, to be completed within 30 days. Without discussing in detail any other pending motions, the court stated, "I am satisfied that there has been plenty of time to get this case ready. Since you'll be to trial in such a short amount of time, it's my intention to continue the other RFO's to the time of trial. So this case has languished long enough in my opinion." When wife's attorney later raised the issue of the pending motion for fees, the court denied it without prejudice to wife raising it at the time of trial. The court then noted, "All of the RFO's are denied except as ordered here -- and without prejudice to seeking fees at the time of trial. . . . This will incentivize the parties to get this case finished, which is what it needs to be -- finished."

Thus, viewing the proceedings as a whole, it is apparent that the court viewed wife's request as untimely -- along with all of the other requests that were pending at the time. Further, it is apparent that the court anticipated wife would make a subsequent request at the time of trial, and made its order

without prejudice. A court has the inherent power to manage matters in its courtroom. (*Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967 ["courts have fundamental inherent equity, supervisory, and administrative powers, as well as inherent power to control litigation before them"].) After over five years of dealing with this case, which, the court noted, had been "litigated on every turn," the court did not abuse its discretion by insisting that all further matters, including wife's last minute request for fees, be brought at the time of trial.

On October 24, 2014, the parties appeared in court for the assignment of a trial date.[8] The hearing began with the court seeking a trial time estimate. The court noted that a 10-day trial, which was predicted, would be expensive and encouraged the parties to seriously "talk settlement." The court made it clear this was the last opportunity before the parties would be assigned a courtroom for trial. Wife's attorney inquired, "But, as far as being ready for trial, do we need to discuss that?" The court responded, "No. You are ready for trial. I set this as a final status conference." Wife's counsel then admitted, "we are not prepared to proceed to trial at this point." The court indicated that parties had plenty of time to get ready, and informed wife's counsel that he would have about 30 days to get ready for trial because the parties would be getting a December trial date. Wife's counsel noted that her motion for interim fees, which the court had put over to the time of trial, had "hamstrung" his client "with respect to experts and . . . other costs." The court

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[8] At the October 24, 2014 hearing the court noted, "My plan is to send you to the [daily settlement officer] one last time. If you don't settle, the case goes down to [Department] 2 for trial."

responded, "Then she has lots of incentive to settle the case because you are going to get a trial date today."

The court's comment was not a statement of its rationale for denying wife's request. In analyzing the context in which the statement was made, the court had repeatedly made it clear that the parties had plenty of time to get the case ready for trial, and no further delays would be tolerated. The court reiterated, "I'm sorry, but I've given you plenty -- ample time to get this case ready." Wife's request was not timely, as she had waited over three years since taking her previous request off calendar. Under the circumstances, wife has failed to demonstrate that the trial court abused its discretion.

4. Prejudice

Wife enumerates three ways in which she was prejudiced by the trial court's alleged error in failing to award her pendente lite fees. Because we have found no error, we need not consider potential prejudice. If anything, wife harmed her own case by failing to move forward with a properly supported, timely request early in the case, when she could have obtained the desired discovery. Wife claims that the denial of fees led to a series of withdrawals of counsel. However, wife cites no evidence in the record suggesting that her counsel withdrew because she did not prevail on her fee motions. This is mere speculation. In fact, there is evidence that she fired at least one of the various attorneys she hired, and another withdrew due to her disinclination to settle the matter.

Wife also claims that she was prejudiced because she could not obtain necessary discovery and necessary expert evidence. Had wife brought a timely motion, with appropriate supporting evidence, early enough in the case to allow sufficient time for

discovery, she may be in a position to claim prejudice resulting from error. Under the circumstances that exist, she is not.

Finally, wife received an attorney fee award of $50,000 shortly before trial. Wife's request for expert fees was denied because she did not provide sufficient information as to "the need for an expert and what they [*sic*] will do." Wife does not raise these rulings and does not contend they were made in error.

Wife relies heavily on *Hatch*, which is distinguishable, because it involved a trial court that refused to exercise its discretion. As to that wife's motion for attorney fees, the *Hatch* court noted, "'Spare yourself that kind of motion. I never grant attorney fees around here . . . . And most attorneys don't even ask for it anymore . . . . I'm not going to rule on attorney fees. I can tell you that right now.'" (*Hatch, supra*, 169 Cal.App.3d at pp. 1217-1218, fn. omitted.) Though wife attempts to describe the present situation as a similar refusal to exercise discretion, it is not. At the time of her first request, the court did not find a need. At the time of her second request, the court was prepared to take evidence on the parties' respective abilities to pay, but wife voluntarily took the matter off calendar. And her later requests, made over three years later on the eve of trial, were found by the court, in its inherent administrative capacity, to have come after the case had languished long enough. Finally, wife did get a discretionary award. That it came at the time of trial was through no error of the court. No abuse of discretion occurred.

II. Denial of community interest in husband's property

Wife contests the trial court's factual determination that there was no community interest in the real properties that were part of husband's business with brother. Wife's contentions fall into two main categories: first, she claims the trial court erred in

failing to perform an analysis pursuant to *Pereira v. Pereira* (1909) 156 Cal. 1 (*Pereira*) and *Van Camp v. Van Camp* (1921) 53 Cal.App. 17 (*Van Camp*).[9] Second, she claims that the court erred in placing the burden on wife to establish a community interest in the business, rather than requiring husband to establish the separate nature of the properties at issue. As set forth below, on the record before us, we find no error.

A. Standards of review

A court's characterization of property as separate or community is reviewed for substantial evidence. (*Beam v. Bank of America* (1971) 6 Cal.3d 12, 25.) Thus, a trial court's findings regarding the nature of property are conclusive on review if supported by substantial evidence, even if the evidence conflicts or supports contrary inferences. (*Ibid.*) Substantial evidence must be "'"reasonable in nature, credible, and of solid value; it must actually be 'substantial' proof of the essentials which the law requires in a particular case." [Citation.]' [Citation.]" (*In re Marriage of Grinius* (1985) 166 Cal.App.3d 1179, 1185.)

Determining the applicable burden of proof is a question of law reviewed de novo. (See *In re Marriage of Ettefagh* (2007) 150 Cal.App.4th 1578, 1584 (*Ettefagh*).)

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[9] These two cases, which will be discussed in further detail, set forth two different approaches to apportionment of marital property. In short, "under the *Pereira* approach, the court calculates a fair return on the spouse's separate property investment in the business, with the remainder belonging to the community. Under the *Van Camp* method, the court values the spouse's community property efforts devoted to the business, with the remainder constituting separate property income." (*In re Marriage of Brooks* (2019) 33 Cal.App.5th 576, 579, fn. 1 (*Brooks*).)

B. Pereira/Van Camp

A community may acquire an interest in a separate property business where the business is partly built on the "personal character, energy, ability, and capacity" of one spouse. (*Pereira, supra,* 156 Cal. at p. 7.) The share of the business's earnings due to such efforts is community property, while the share due to separate property invested in such business remains separate property. (*Ibid.*) There are two methods for allocating such property, known as the *Pereira* method and the *Van Camp* method. (*Brooks, supra,* 33 Cal.App.5th at p. 590.)

"'"The *Pereira* approach is to allocate a fair return to the separate property investment and allocate the balance of the increased value to community property as arising from community efforts.". . . [Citation.]' [Citation.]" (*Brooks, supra,* 33 Cal.App.5th at p. 590.) '"Conversely, *Van Camp* is applied where community effort is more than minimally involved in a separate business, yet the business profits accrued are attributed to the character of the separate asset." [Citation.] "The *Van Camp* approach is to determine the reasonable value of the community's services, allocate that amount to community property and the balance to separate property." [Citation.]' [Citation.]" (*Ibid.*)

Wife argues that the trial court failed to understand its duty to make an apportionment of the business, and instead simply relied on husband's testimony and title records in ruling that all of the properties were husband's separate property. However, wife fails to point to a place in the record where the trial court made an erroneous ruling on this issue, or expressly declined to apply the methodologies in question. In fact, as husband points out, wife does not provide a citation to the record

showing that she, at any time, asked that the court make an apportionment under either *Pereira* or *Van Camp*. The trial court was not required to invoke these cases, or perform an apportionment analysis under either case, on its own motion, or raise the issue in the absence of prompting from the parties. The court is not a partisan advocate for either party, and may not act as one. (*Associated Builders & Contractors, Inc. v. San Francisco Airports Com.* (1999) 21 Cal.4th 352, 366, fn. 2 (*Associated Builders*) [parties must provide analysis and argument to support each assertion]; *Dills v. Redwoods Associates, Ltd.* (1994) 28 Cal.App.4th 888, 890, fn. 1 (*Dills*) [courts will not develop parties' arguments for them].) Having declined to request such apportionment at trial, wife has forfeited any claim of error. (*People v. Doolin* (2009) 45 Cal.4th 390, 438.)

Further, under questioning during trial, neither husband's nor wife's experts expressed that they had completed either a *Pereira* or *Van Camp* analysis. Thus, the trial court was not presented with any calculations supporting a distribution of property under these methods. Wife's forensic accountant, Brian Lewis, testified that he relied on an appraiser's opinion that "residential rental properties" -- which describes all properties owned "either partly or fully" by husband, with the exception of one commercial property -- "do not have a value that would have been created from the personal efforts of an owner or . . . manager." However, Lewis calculated $50,000 community "participation" in a commercial property on Lankershim Boulevard in North Hollywood as of the date of separation.[10]

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[10] Notably, wife's expert observed that wife disagreed with his conclusions. "[Wife] reviewed my conclusion as to the community

Husband's forensic accountant, Michael Krycler, testified that this was not a *Pereira* case, and was possibly closer to a *Van Camp* case.[11] However, he determined that the community was "more than adequate[ly]" compensated for the reasonable value of the community's services. The court noted that there was "no evidence that any community money had been used to purchase or improve the [separate business] property." The court also noted that it found irrelevant the evidence regarding the amount of time husband spent at work, since it had "little bearing on any issue before the court."

The court had no spontaneous duty to perform a *Pereira* or *Van Camp* analysis. Wife did not present one, and neither of the parties' experts performed a formal analysis under either method. Under the circumstances, wife forfeited this issue, and has failed to show that the trial court committed error.

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participation and the values I attributed it to. She disagreed with my conclusion, and, therefore, I felt it appropriate to include, in my report, her objection. I've never done this before, but I felt it was important to include it because of the materiality of her objections."

[11] Specifically, Krycler testified that he would have needed a lot more information to do a *Pereira* analysis, such as appraisals of the properties both at the start of marriage and at the end. In addition, "[o]ne would also need to separate how much of the increase was due to the marketplace, just simply the price of real estate going up." Krycler believed it was closer to a *Van Camp* analysis because all of the properties were separate property, noting that "[t]hey've been separated to the greatest extent accounting-wise." At one point during his testimony Krycler referred to his report as "the equivalent of a *Van Camp* analysis."

C. Burden of proof as to the nature of the property

Generally, all property owned by a person before marriage is considered separate property. (§ 770, subd. (a)(1).) "The rents, issues, and profits of the property" owned by that party before marriage is also separate property. (§ 770, subd. (a)(3).)

Wife contends that the court legally erred when it placed the burden on her to prove and quantify the community property interest in husband's separate properties. Because the financial records were controlled by husband, wife argues, the court should have assigned to husband the burden to defeat a presumption of community property. In support of this argument, wife cites *Wolf v. Superior Court* (2003) 107 Cal.App.4th 25, 35 ["where essential financial records are in the exclusive control of the defendant who would benefit from any incompleteness, public policy is best served by shifting the burden of proof to the defendant, thereby imposing the risk of any incompleteness in the records on the party obligated to maintain them"].) Wife admits that the record "leaves no doubt" that there were insufficient financial records to determine the business income during the marriage. Husband admitted that due to the family nature of the business, and for "cultural" reasons, accurate records of certain financial transactions were not available. Wife asserts that as the managing spouse, husband had a fiduciary duty to account for his business income and maintain adequate records. (*In re Marriage of Feldman* (2007) 153 Cal.App.4th 1470, 1478-1488 (*Feldman*).)

Again, wife's broad argument as to the trial court's supposed error fails to identify a specific place in the record where this issue was raised or the trial court made an erroneous decision. Wife does not contend that she cited the trial court to either *Wolf* or *Feldman*, nor does she cite to a specific motion or

argument where she asked that the court shift the burden in this case based on lack of access to records. While the court may shift a burden of proof "based on considerations of fairness and policy" (*In re Marriage of Prentis-Margulis & Margulis* (2011) 198 Cal.App.4th 1252, 1267 (*Margulis*), the court is not an advocate, and is not required to do so on its own motion. Nor is the court required to independently research these issues without adequate argument from the parties. On this basis alone, wife has failed to show error. (*Associated Builders, supra,* 21 Cal.4th at p. 366, fn. 2 [parties must provide analysis and argument to support each assertion]; *Dills, supra,* 28 Cal.App.4th at p. 890, fn. 1 [courts will not develop parties' arguments for them].)[12]

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[12] As a general rule, in order to raise issues on appeal, wife was required to first raise them in the trial court. (*Johnson v. Greenelsh* (2009) 47 Cal.4th 598, 603.) The general rule against new issues on appeal is subject to an exception that grants appellate courts the discretion to address questions not raised in the trial court when the theory presented for the first time on appeal "involves only a legal question determinable from facts that are (1) uncontroverted in the record and (2) could not have been altered by the presentation of additional evidence. [Citations.]" (*Esparza v. KS Industries, L.P.* (2017) 13 Cal.App.5th 1228, 1237-1238.) In this case, husband contests wife's claim that she did not have access to records. He argues that wife never filed a motion to compel, and never asked for, nor showed that she was prevented from obtaining, any such records. Further, wife does not specify what records would have supported her claim, or that such records exist. These factual matters were required to have been resolved in the trial court in order to resolve the question of whether the burden should be shifted due to wife's inability to access certain records.

Nor does wife distinguish between the separate property owned by husband before the marriage, the property purchased by husband and brother during the marriage, or the properties purchased by husband during the marriage. As to the properties purchased by husband during marriage, which are presumptively community property, the trial court correctly cautioned husband that it was his burden to show that they were purchased with separate property to make them his separate property.[13] Wife does not dispute that husband provided testimonial evidence to this effect. Husband's testimony constitutes substantial evidence.

Wife seeks a retrial in which husband is required to disprove the community interest in the business. However, wife provides no legal authority that such a result is required under the circumstances of this case. There is no evidence that husband violated any discovery orders, provided false or incomplete information, or violated his fiduciary duty to wife. (See *Feldman, supra,* 153 Cal.App.4th 1470 [affirming imposition of sanctions by trial court after the trial court found that the husband breached his fiduciary duty to disclose financial information to his former wife].) The court expressly held that there was "no evidence that either party breached their fiduciary duty to the other party." Nor does wife allege any specific mistake of fact wherein husband misrepresented the value of any assets. (*In re Marriage of Brewer & Federici* (2001) 93

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[13] Specifically, the court instructed husband's attorney: "The four lots . . . the ones that are in the desert I think he said. Those would be presumed to be community property. So it's your burden to show that he purchased them with separate property to make them his separate property."

Cal.App.4th 1334, 1346 [affirming trial court's grant of husband's motion to set aside marital settlement based on unilateral mistake where husband did not have accurate and complete valuations of his former wife's pension plans].)

Wife cites *Haldeman v. Haldeman* (1962) 202 Cal.App.2d 498 (*Haldeman*), in support of her position. *Haldeman* involved the husband's pharmacy business, which he was in the process of acquiring and had almost paid off at the time of marriage. The court found that it had grown into a "substantial business" during the 22-year marriage, and was at least partly community property. (*Id.* at p. 502.) Under those circumstances, the court found that the business was presumptively community property and placed the burden on husband to show by a preponderance of the evidence that it was separate property. (*Id.* at p. 501.) Because there was evidence that the business had expanded substantially during the long-term marriage, those additional business assets had been acquired during marriage and were presumptively community property. (§ 760.) The *Haldeman* court stated that the trial court was not required to find that the business was entirely community property, but "the evidence introduced does not justify a finding that it was all the husband's separate property." (*Haldeman*, at p. 506.) The matter was reversed and remanded for retrial for a determination of this factual question.

Similarly, in *Margulis*, the court noted that "where one spouse exercised exclusive control over community property, the parties will have vastly *unequal* access to evidence concerning the disposition of that property." Under those circumstances, "fairness requires shifting to the managing spouse the burden of proof on missing assets." (*Margulis, supra*, 198 Cal.App.4th at p.

1268.) Like *Haldeman, Margulis* involved burden-shifting in the context of disposition of *community* property.

In this matter, in contrast, the evidence showed that husband and brother owned the business prior to the marriage and it remained separate property throughout the marriage. Property owned by one party prior to marriage is presumptively separate. (§ 770, subd. (a).) As to the four parcels purchased during the marriage, the court properly placed the burden on husband to show that such properties were separate. Husband provided evidence to this effect, and wife did not provide contradictory evidence. *Haldeman* and *Margulis,* which involved different factual circumstances, do not undermine the court's findings in this matter.

Nor does *In re Estate of McCarthy* (1932) 127 Cal.App. 80 (*McCarthy*), which stated the rule that "where at the time of his marriage the husband has a definite amount of his separate property invested as capital in his business, which he continues to conduct, the entire profits therefrom are not necessarily his separate property but may be the result of his energy and ability. [Citation.]" (*Id.* at p. 86.) Under these circumstances, the court must determine whether a portion of the profits constitute community property. The court held that, "while it must be presumed in the absence of evidence that some [profits] were due to the capital invested, . . . if the husband claims that his capital was entitled to a greater return than legal interest the burden of showing the fact rests on him. [Citations.]" (*Ibid.*) The increase in value of the business during marriage "appear[ed] to have been considerable," thus it was husband's obligation to show that such increase "was not to some extent due to his efforts and ability." (*Id.* at p. 88.) The husband was deceased at the time of

trial and therefore could not testify. The record showed that "the books were available," although the husband's estate failed to disclose them. (*Ibid.*) The *McCarthy* court indicated that under the circumstances, husband's estate failed to show what part of the business was separate and what part, if any, was community. (*Id.* at pp. 88-89.)

The record before us is different. First, there was evidence that husband adequately reimbursed the community for his efforts. Further, there was ample evidence that the business property, and "[t]he rents, issues, and profits" of such property, remained separate. (§ 770, subd. (a)(3).) The trial court found that husband "clarif[ied] the history of the property and . . . show[ed] by a preponderance of the evidence" that it remained separate throughout the marriage. (*McCarthy, supra,* 127 Cal.App. at p. 88.)

None of the above cases cited by wife support her claim that a retrial is warranted in this case.[14] Wife was never denied a motion to compel evidence, makes no claim that relevant evidence was improperly excluded, and never sought a finding that evidence was fraudulently misrepresented. During the 10-day trial the parties had the opportunity to fully present their

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[14] Wife also cited *Brace v. Speier (In re Brace)* 566 B.R. 13 in her opening brief in support of applying a community property presumption in this matter. She informs this court that the Ninth Circuit recently certified the matter to the California Supreme Court for resolution of the question whether the community property presumption trumps the Evidence Code section 662 presumption in certain circumstances outside of a dissolution action. We agree with wife that the question here is distinguishable.

cases, and husband presented sufficient evidence that the business remained separate property.

D. Burden of proof as to joinder properties

Wife filed a motion for joinder seeking to join brother in the proceedings due to the fact that several properties were purchased during the marriage in brother's name. Wife asserted that she had evidence that husband was involved with the purchase of these properties, which included the properties referred to as Corning, Mentone, and Fairfax. Brother also declared that he was sole owner of other properties, including properties on Olympic, Ardmore, and his family residence on Maple Drive in Beverly Hills.

During trial, the court made the following comment:

> "Each one [of] those four properties has been held by Joseph Mahgerefteh or Joseph Mahgerefteh and his wife that [husband], has never been on title.[15] So I'm going to take that as an assumption. If that's not true, then the comment I'm about to make is not true. But assuming that that is true, Evidence Code section 662 says, 'the owner of the legal title to property is presumed to be the owner of the full beneficial title. This presumption may be rebutted only by clear and convincing evidence.'"

Although wife made no objection at the time the court stated its understanding of the law, wife now argues that the court was wrong in applying this presumption, because the evidence showed that the joinder properties were purchased and operated within the brothers' partnership. Wife cites brother's

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15 The court was referring to properties on Mentone, Ardmore, Fairfax, and Olympic.

testimony that "it didn't matter who was on title" because the brothers were "equal partners." Wife argues that the trial court erroneously focused solely on the title to the properties, and imposed on wife the clear and convincing standard of proof. Wife cites Corporations Code section 16204 for the principle that property acquired with partnership funds is presumed to be partnership property, regardless of title. Wife likens these property purchases in brother's name to fraudulent transactions, and argues that the standard of proof under the circumstances should be preponderance of the evidence. (Civil Code, § 3439.04, subd. (c) [creditor seeking to void a fraudulent transfer has the burden of proving the elements of the claim for relief by a preponderance of the evidence].) Wife provides no citation to the record indicating that she made this mixed factual and legal argument to the trial court. Therefore we need not address her claim. (*Johnson v. Greenelsh, supra,* 47 Cal.4th at p. 603.)

Further, wife fails to show how any purported error in the trial court's application of the standard of proof has harmed her. Wife is required to show prejudicial error. (*People v. Cahill* (1993) 5 Cal.4th 478, 487.)[16] We note that the trial court found husband to be more credible in this area of testimony. During the parties' discussion with the court on the joinder properties,

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[16] Article VI, section 13 of the California Constitution provides: "No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury, or of the improper admission or rejection of evidence, or for any error as to any matter of pleading, or for any error as to any matter of procedure, unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice."

the court specifically asked wife's attorney what evidence there was supporting her request for relief in joinder. Wife's attorney was unable to present any actual evidence. The court noted:

> "So you said that the evidence is there was a check from a joint account with [brother] and [husband]. I mean no disrespect, it's -- rather than . . . [brother] and [husband], that went into the Fairfax property. That's right, but that's consistent with what they're saying. So where is that evidence that shows money from the community into this business?"

Wife's attorney responded by pointing out wife's "contention," at which point the court immediately interrupted: "I don't need a contention. I need evidence." Wife's attorney then discussed possible concealment, stating "[t]he problem we're facing here is that because of all of the issues with documents and withholding of documents, concealing documents, the Quick Books, we don't have at this point that one document that says here is a check going from the community to the business."

The court commented, "the subtext of this case is that there is some document or documents or bank account or bank accounts or deed or deeds or something. The Quick Books I think is probably the one, the lightning rod everybody keeps focusing on, that, . . . had we just found it, we would have a much different case." However, the court reiterated that the case was six and a half years old, and there was simply "no evidence here to keep [brother] in." Given the court's determination that there was "no evidence" supporting wife's claim to the joinder properties, a

different burden of proof would not have changed the outcome.[17] In light of wife's absence of evidence in this area, we need not address the burden of proof imposed, as wife has failed to show prejudicial error under the circumstances.[18]

E. The lots purchased during the marriage

Wife next contests the trial court's factual finding that the four lots that husband purchased during the marriage were husband's separate property. The trial court made the following finding: "During marriage, [husband] bought 4 properties for

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[17] The court also noted, in its September 23, 2015 "Response to Claimant's Request for Statement of Decision," that wife "put on little evidence that supports her ownership claims to the various properties in issue in the Complaint for Joinder. . . . The Court does not believe this is a failure of proof at trial, but an absence of any supporting evidence to present at trial."

[18] On appeal, wife cites *In re Marriage of Davis* (1977) 68 Cal.App.3d 294 (*Davis*) for the proposition that a family court has the power to determine "whether or not the community property includes the property to which title is being held by a third person," (*id.*at p. 301), and should do so under a preponderance standard. (*Id.* at p. 307.) *Davis* does not assist wife's argument, due to the absence of evidence in the record. In *Davis,* the parties did not challenge the court's finding that the property in question was community property, but whether the trial court had the power to determine the nature of the property in question since title was held by a third party. (*Id.* at pp. 305-306). Thus, *Davis* does not assist wife in the court's assessment of evidence in this matter. Wife cannot prevail as to the joinder properties without evidence supporting her claim to them, where, as here, husband and brother provided competent, credible testimony that they were wholly separate.

several hundred dollars each. In light of [husband's] testimony, it is clear that his separate property was used to purchase the property." Wife argues that husband's uncorroborated claim is insufficient to overcome the presumption that property acquired during marriage is community property unless traceable to a separate property source.

Section 760 states the presumption that, except as otherwise provided by statute, all property acquired during the marriage is community property. (§ 760.) This presumption may be overcome by a preponderance of the evidence. (*Ettefagh, supra*, 150 Cal.App.4th at p. 1591.) "Whether or not the presumption is overcome is a question of fact for the trial court. [Citations.]" (*In re Marriage of Mix* (1975) 14 Cal.3d 604, 611 (*Mix*).)

In support of her argument, wife cites *Mix*, which noted that "post-marital property can be established to be separate property by two independent methods of tracing." (*Mix, supra*, 14 Cal.3d at p. 612.) The first method of tracing described by the court is direct tracing of funds, and the second method is done through "a consideration of family expenses." (*Ibid.*) "If at the time of the acquisition of the property in dispute, it can be shown that all community income in the commingled account has been exhausted by family expenses, then all funds remaining in the account at the time the property was purchased were necessarily separate funds. [Citations.]" (*Ibid.*)

The trial court had before it evidence of both the precise source of the funds and of the community's income and expenses. First, it had husband's testimony, which the court found credible, stating that his separate property was used to purchase the lots. As noted in *Mix*, "'The testimony of a witness, even the party

himself, may be sufficient.' [Citation.]" We must view the evidence in the light most favorable to husband, giving it the benefit of every reasonable inference, and resolving all conflicts in his favor. (*Mix, supra*, 14 Cal.3d at p. 614.) Thus, husband's testimony alone constitutes substantial evidence to overcome the community presumption.

Further, the court found that the community had fairly modest funds:

> "For the vast majority of the last few years of the marriage [husband] only brought home $4,500 per month and [wife] did not work . . . . [I]t is apparent to the court that [husband] was increasing the marital lifestyle to some degree through his rental property income. If nothing else, it appears that he was not charging the community rent for an apartment in Santa Monica. . . . The court finds the lifestyle of the parties was lower middle class."

The court noted that due to the community's modest funds, "the sole source for repayment" of any borrowing against husband's separate property "would be [husband's] separate real property and income derived from the real property." In other words, the court implicitly found that the community did not have the funds to invest in or purchase real property. Under the circumstances, the evidence supported a conclusion that the lots were necessarily purchased with separate funds. (See *Mix, supra,* 14 Cal.3d at p. 612.)

In re Marriage of Higinbotham (1988) 203 Cal.App.3d 322 does not assist wife. In *Higinbotham*, the trial court concluded that mortgage payments on a house owned by the husband prior to marriage were made with community funds. The husband failed to address the question of substantial evidence, "perhaps

because of the daunting burden placed on one who challenges the sufficiency of the evidence to support a trial court finding. [Citation.]" (*Id.* at pp. 328-329.) The trial court reached a different conclusion in this case, due to different factual circumstances and evidence. As in *Higinbotham,* wife has failed to meet her burden to show the trial court's conclusion was not sufficiently supported by the evidence.

III. Denial of continuance

Wife argues that the trial court erred in refusing her request for a continuance of trial, despite its understanding that she should have been granted pendente lite attorney fees in order to be able to prepare for trial. The denial of a continuance is reviewed for abuse of discretion. (*Volkering v. Allen* (1950) 96 Cal.App.2d 804, 807.)

Wife appears to be appealing the denial of her ex parte request for continuance filed on July 2, 2015, four days before trial. We find no abuse of discretion. The petition for dissolution had been filed over six years earlier. The court had noted at various stages of litigation that the matter had been in the system a long time, and that wife had ample time to prepare. Wife had on at least two prior occasions requested, and been granted, significant continuances. Under the circumstances, we decline to find an abuse of discretion.

In support of her position, wife cites the hearing transcript from April 2, 2015, two weeks before trial was set to commence. On that date, wife appeared in pro. per. seeking, among other things, a second continuance. Wife had previously obtained a continuance, over husband's objection, from February 2015 to April 15, 2015. At the April 2, 2015 hearing, the court noted that "jamm[ing] this thing to trial is a prejudice . . . [and] not exactly

what the legislature had in mind." The court accordingly continued trial from April 15, 2015, to the week of July 6, 2015. Wife's citation to the trial court's commentary on that date does not suggest an abuse of discretion, since wife in fact obtained a second continuance at the April 2, 2015 hearing.

Wife then proceeds to cite trial transcripts, where she claims it became clear that she had been prejudiced by her lack of funds and records. On the third day of trial, the court noted that it did not yet have a report from wife's expert, Brian Lewis. Wife's attorney noted that Lewis was awaiting some appraisal reports. The court noted, "This case in truth and in fact was not ready to go to trial." The parties then discussed the order of presentation of evidence. The trial court noted that it disagreed with "the prior rulings about attorney fees, obviously, because I made an attorney fee award." However, the court also understood husband's position, stating, "This is an old, old case." The court observed, "between the 'I'm not ready because I don't have money' and the 'I want to get this case over,' we're between a rock and a hard spot." The court, at that point, was not entertaining any request for continuance, nor did wife's counsel make one. The court was simply describing where the matter stood at that time, and attempting to appease husband's concerns regarding the state of the evidence.[19] Wife fails to acknowledge the delays that were attributable to her, and has failed to show an abuse of discretion.

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[19] Husband's counsel noted, "we're now three days into the trial. We don't even know what's being appraised or who the appraiser is. I mean, you'd have to admit it's a little--" to which the court interrupted, "I will admit whatever you're going to ask me to admit."

IV. BofA accounts

Wife next contends that the trial court erred in determining that the entirety of the BofA accounts in her name constituted community property. Specifically, the trial court held:

> "The Bank of America checking account, maximizer savings account and CD accounts held in [wife's] name in the balance of $250,194 is also charged to her because there is no evidence that that money was a gift from her parents and it is clear from the evidence that she took control of this money after the date of separation. She owes the community a reimbursement of $250,194."

The court's factual determination that the money in the BofA accounts was community property is reviewed for substantial evidence. (*Beam v. Bank of America, supra,* 6 Cal.3d at p. 25.)

Wife's ownership of the BofA accounts pre-dated the marriage. Wife testified that prior to marriage, the accounts contained less than $30,000. Husband testified that wife worked for a few years into the marriage, and deposited her paycheck into those accounts. Thus, his testimony was that the money was accumulated from wife's employment during the marriage. Wife did not pay expenses of the community from the BofA accounts where she deposited her paychecks. The household expenses were paid from the parties' joint account at Union Bank.

Wife cites no evidence which contradicts husband. Instead, she points to what she refers to as conflicting testimony of husband's. For example, husband testified that their sole joint account was at Union Bank. In reference to the BofA account, husband was asked, "That was not your account, was it?" He responded: "No." Wife argues that husband should not have

been permitted to change his position, and should be estopped from arguing that the account contained community funds. She cites *Jackson v. County of Los Angeles* (1997) 60 Cal.App.4th 171, 181 for the proposition that judicial estoppel exists to keep a party from "playing fast and loose" with the courts.[20]

The contradictory testimony by husband does not undermine the trial court's finding that the funds in the BofA accounts were community property. Husband testified that wife owned the accounts before marriage and put her earnings during the marriage into those accounts. This is consistent with husband's testimony that the BofA accounts were, in the customary sense of the word, hers. It does not mean that they were not legally community property based on the nature of the funds deposited into the accounts. The trial court was the ultimate fact-finder, and was not required to accept husband's label of the accounts.

Husband's testimony constitutes substantial evidence supporting the trial court's factual decision on this issue. (*Mix, supra,* 14 Cal.3d at p. 614 ["'The testimony of a witness, even the party himself, may be sufficient'"].)

V. Retroactive modification of temporary support

In 2011, Judge Lewis awarded temporary child and spousal support in the amounts of $769 and $1,127, respectively, based on husband's claim of $4,500 monthly income. In its October 7,

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[20] Wife also cites various pleadings, declarations and discovery responses where husband referred to the BofA account as wife's account. Wife does not provide a citation to the record indicating that she presented this conflicting evidence at trial. Thus, the trial court did not consider it, and it is not relevant to our analysis of substantial evidence before the trial court.

2015 written order after trial, the trial court adjusted these awards on a going-forward basis, granting wife $1,512 per month in child support and $1,750 in spousal support.[21]

During an exchange at trial regarding the relevance of testimony regarding the rental value of wife's residence, the court noted that it was not permitted to make an award based on past rent because it would go to the issue of spousal support. The court further noted, "there's no pending RFO to modify spousal support by either party is my understanding." Even if there were a pending RFO, the court took the position that "I can only do spousal support on a going forward basis." However, the court invited the parties to further discuss the issue: "If I've got it all wrong, somebody needs to tell me." No further discussion took place at that time.

In its written order after trial dated October 7, 2015, the court noted that wife had made a claim that "any support award in this matter should be retroactive to an earlier date." The court reiterated, "there is no legal authority for the court to retroactively adjust either the spousal or child support payable to the [wife] as there is no pending RFO."

Wife challenges the court's decision on this issue, stating that because the court had previously expressly reserved jurisdiction, its temporary support order could have been modified back to the original RFO filing date. In support of her position, wife cites *In re Marriage of Freitas* (2012) 209 Cal.App.4th 1059, 1074-1075 (*Freitas*).)

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[21] Spousal support would lessen incrementally until December 31, 2017, at which time it would cease unless wife could demonstrate need.

In *Freitas*, the initial OSC seeking child support and spousal support was filed by the husband in August 2010. (*Freitas, supra,* 209 Cal.App.4th at p. 1063.) At the time, husband asserted that wife misrepresented her income, and the trial court expressly reserved jurisdiction to reconsider wife's income upon allowing husband to present such evidence. (*Ibid.*) In February 2011, the husband filed an application for modification of the previous order, on the ground that he had lost his job. (*Id.* at p. 1064.) Citing *In re Marriage of Gruen* (2011) 191 Cal.App.4th 627 (*Gruen*), the trial court determined that it lacked jurisdiction to reassess wife's income prior to 2010. (*Freitas*, at p. 1065.)[22]

Wife provides two citations to the record in support of her position that the trial court had expressly reserved jurisdiction to modify support in this matter. The first is to a hearing that took place on August 4, 2010. At the hearing, wife was permitted to question husband on a newly-produced tax return. However, the court ultimately did not find that the new evidence was sufficient to cause it to vary from its tentative decision on support. The court noted, "[O]n this record I don't have enough evidence about his income that's beyond what I have heard so far." The court noted, "[A]s to support back to [wife], I am going to continue that request to until the time of trial."

The second was from a notice of ruling as to the trial court's decision on wife's April 2, 2015 ex parte application to continue

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[22] In *Gruen*, the court held that a trial court lacked jurisdiction to retroactively modify a pendente lite support order to any date earlier than the date on which a proper pleading seeking modification of such order is filed. (*Gruen, supra,* 191 Cal.App.4th at p. 631.)

trial and for various other relief. The notice of ruling notes that the court "would not consider any Motions for Modification of spousal support prior to the Trial of this matter."

In general, a court may not retroactively modify a temporary support order. (*Freitas, supra,* 209 Cal.App.4th at p. 1074.) However, in *Freitas*, the parties' clear expectation was that the original support orders were not final. "The trial court's original child and spousal support awards . . . were not fully dispositive of the rights of the parties with respect to the amount of support to be awarded for September and October 2010, and therefore did not constitute final support orders as to those months." (*Id.* at pp. 1074-1075.) Additionally, because the trial court specifically reserved jurisdiction over the husband's August 2010 OSC seeking support, and at no time did the husband take it off calendar. (*Id.* at p. 1075.)

While wife may have had an argument, based on *Freitas*, that the various judges in this matter retained jurisdiction of her initial request over a six-year period, it does not appear that she, at any time, brought *Freitas* to the attention of the court or argued that the court was wrong in its perception that it had no jurisdiction to amend the previous order without a "proper pleading seeking modification." (*Freitas, supra*, 209 Cal.App.4th at p. 1062.) As shown above, the court clearly stated its understanding of the law on this issue, and offered that the parties were welcome to further argue the issue, stating: "If I've got it all wrong, somebody needs to tell me."

We find that it is unclear from the record before us whether the trial court retained jurisdiction throughout the years of pretrial litigation to modify the temporary spousal support order made in August 2010. The trial court should have made this

factual determination in the first instance, after both parties had a full opportunity to present the issue. (*Quiles v. Parent* (2018) 28 Cal.App.5th 1000, 1005.) ""Appellate courts are loath to reverse a judgment on grounds that the opposing party did not have an opportunity to argue and the trial court did not have an opportunity to consider. [Citation.] In our adversarial system, each party has the obligation to raise any issue or infirmity that might subject the ensuing judgment to attack . . . ." [Citations.]' [Citation.]" (*Premier Medical Management Systems, Inc. v. California Ins. Guarantee Assn.* (2008) 163 Cal.App.4th 550, 564.) Wife has failed to show that she raised *Freitas* in the trial court, or took the court up on its offer to entertain arguments on the issue of whether it had jurisdiction to award retroactive support without a pending RFO. Because of her failure to raise this specific challenge in the trial court, wife has forfeited this issue on appeal. (*Ibid.*)

VI. Request for appeal fees

Wife contends that the trial court abused its discretion in denying her request for appeal fees. *In re Marriage of Davis* (1983) 141 Cal.App.3d 71 (*Davis*), sets forth four factors which a party must satisfy to warrant an award of fees on appeal: "(1) the requesting spouse must show a need for the award; (2) the paying spouse must have the ability to pay the fees; (3) the appeal must be taken in good faith; and (4) there must be reasonable grounds for the appeal, although this does not imply that the requesting spouse must prevail on appeal. [Citation.]" (*Id.* at p. 78.) Finding that wife had not shown good faith or reasonableness, the trial court determined that it need not reach the issue of wife's need or husband's ability to pay.

Wife first argues that the court erred in failing to consider the parties' relative ability to pay. However, the record shows that it did -- in fact, the court noted that wife owed husband a substantial sum pursuant to the judgment. The court stated, "while [husband] may have ability to pay, he is also owed $150,000 pursuant to the judgment so that would undercut a finding that he has the ability to pay since he is owed that large amount."[23]

Even if she still had the fees, wife argues, "[t]he fact that the party requesting an award of attorney's fees and costs has resources from which the party could pay the party's own attorney's fees and costs is not itself a bar to an order that the other party pay part or all of the fees and costs requested." (§ 2032, subd. (b).) However, this section does not prevent a trial court from considering a party's debt to the community in deciding on a fee request. In fact, "Financial resources are only one factor for the court to consider in determining how to apportion the overall cost of the litigation equitably between the parties under their relative circumstances." (§ 2032, subd. (b).) Neither *In re Marriage of Sorge* (2012) 202 Cal.App.4th 626, 662-664 [affirming wife's appeal fees where she possessed assets of $7.5 million because husband had $64 million] nor *In re Marriage of Dietz* (2009) 176 Cal.App.4th 387, 405-406 [requiring court to "determine how to apportion the overall cost of the litigation

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[23] Wife argues that whether or not she absconded with the approximately $250,000 in her BofA accounts, plus the $36,000 from the Union Bank account, she had accounted for it and no longer had it. This argument is unpersuasive, wife cites no authority suggesting that her use of the money relieves the trial court of an obligation to consider the debt owed to husband.

equitably between the parties under their relative circumstances"], suggests that the court erred in considering wife's debt to the community. On the contrary, those cases reaffirm the court's discretionary power to decide ""what is just and reasonable under the relative circumstances."" (*Id.* at p. 406.)

Wife's argument that the trial court erred in finding that wife had not demonstrated good faith is also not well taken. Wife provides no substantial discussion or evidence on this point beyond a conclusory assertion. The trial court supported its decision with reference to the attorney declarations submitted by wife, finding that the nature of the litigation, the manner in which it had been conducted and the "boilerplate" declarations, did not meet the good faith requirement. The trial court was in the best position to assess the evidence before it, and we do not reevaluate such evidence. (*In re Marriage of Duncan* (2001) 90 Cal.App.4th 617, 625.)

Wife questions whether *Davis*, which sets forth the four factors which must be met to warrant an award of fees on appeal, squares with section 2030, which wife argues says nothing about good faith and reasonable grounds. However, *Davis* is over 30 years old and the Legislature has not acted to undermine it. "'[T]he Legislature is deemed to be aware of existing laws and judicial decisions . . . and to have enacted and amended statutes "'in the light of such decisions as have a direct bearing upon them."' [Citation.]" (*Apple, Inc. v. Superior Court* (2013) 56 Cal.4th 128, 146.) The Legislature has not acted to amend or clarify section 2030 in light of *Davis*, thus we follow this long-

standing precedent in determining when appellate fees are appropriate.[24]

Wife also argues that the trial court conflated good faith with objective merit. Wife cites *In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 649, and *In re Marriage of Gong & Kwong* (2008) 163 Cal.App.4th 510, 516, both of which define good faith as a subjective standard, looking to the motives of appellant and counsel. However, neither case involved an award of attorney fees on appeal. Both cases involved requests for sanctions. Wife cites no authority that the two standards are identical, and she cites no authority suggesting that the trial court's rationale in this matter was improper. The court balanced not only the objective merit of wife's anticipated appeal, but also the overall conduct of the litigation, and wife's debt to husband, in reaching its conclusion that appellate fees were not warranted.

A motion for attorney fees and costs in a dissolution proceeding is left to the sound discretion of the trial court, and will not be disturbed absent a clear showing of abuse. (*In re Marriage of Duncan, supra*, 90 Cal.App.4th at p. 630.) Wife has failed to show an abuse of discretion.

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[24] In her reply brief, wife cites *In re Marriage of Morton* (2018) 27 Cal.App.5th 1025 (*Morton*), published subsequent to the filing of wife's opening brief in this appeal. Wife argues that *Morton* "abrogates" *Davis* because *Morton* clarifies that a court must only rely on the statutory factors set forth in section 2030 in determining whether pendente lite attorney fees are appropriate. However, *Morton* involved trial fees, not appeal fees. Thus, *Morton* does not invalidate the *Davis* factors of good faith and reasonable grounds for a party seeking fees to appeal.

DISPOSITION

The judgment is affirmed. Husband is awarded his costs of appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
CHAVEZ

We concur:

_____, P. J.
LUI

_____, J.
HOFFSTADT